

Construction & Projects

## Court of Appeal Determines When a Payment Claim Can Be Served After Termination of a Contract

### Introduction

The Building and Construction Industry Security of Payment Act ("**SOPA**") provides a statutory mechanism through which contractors may serve payment claims on their employers and initiate adjudication if such claims are not paid. However, in what circumstances can a payment claim be validly served even after the termination of the underlying contract between the contractor and employer? This was the issue considered by the Court of Appeal in *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2020] SGCA 121.

In that case, the payment claim had been served about two years after the termination of the contractor's employment. The High Court had found the payment claim to be valid, adopting the position that statutory entitlement to payment must survive termination, without regard to the terms of the contract.

The Court of Appeal disagreed with the High Court, highlighting that the terms of the contract must always be considered, and that the contractor must show that there is a basis for claiming such payment under the contract terms. On the facts, the Court of Appeal found that the provisions of the relevant contract which purportedly justified the service of the payment claim after termination was inapplicable and allowed the appeal.

The decision demonstrates the proper approach to determining the validity of a payment claim following the termination of the underlying contract, as well as the importance of serving payment claims in a timely and reasonable manner.

This Update provides a summary of the key points of the Court of Appeal's decision.

### Brief Facts

Orion was the owner and developer of a condominium project and Dong Cheng had taken the role of main contractor via a Novation Agreement over a contract which incorporated the Real Estate Developers' Association of Singapore Design and Build Conditions of Main Contract (3rd Ed, July 2013) ("**REDAS Conditions**"). The parties subsequently entered into a Supplementary Agreement to vary certain terms.

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In 2017, Orion terminated Dong Cheng's employment in accordance with clause 2.5 of the Supplementary Agreement. About two years later, Dong Cheng served a payment claim on Orion ("PC 25"). The claim was disputed by Orion.

Dong Cheng submitted PC 25 for adjudication. The adjudicator granted Dong Cheng's application in part, finding that Dong Cheng was entitled to serve PC 25 despite the fact that PC 25 was served after Dong Cheng's employment had been terminated ("AD").

Orion applied to court to set aside the AD on the ground that PC 25 was invalid. The High Court dismissed the application, finding that a payment claim for works performed prior to the termination of a contractor's employment and submitted after termination was perfectly valid. Orion appealed against this decision.

### Holding of the Court of Appeal

The Court of Appeal reversed the High Court's decision, finding that PC 25 had not been validly served and setting aside the AD.

#### Payment claims served after termination

In considering the question of whether a payment claim is valid despite having been served after the termination of the contractor's employment, the Court of Appeal declined to adopt the approach that such payment claims are valid as long as they are for works performed before the termination. The Court held that the starting point of the analysis must always be the terms of the contract.

A contractor making a claim for progress payments under the SOPA must show that there is a basis for claiming such payment under the terms of the contract in question. Therefore, in order to determine whether a contractor is entitled to serve a payment claim after the termination of its employment, the court must have regard to the terms of the contract.

The Court highlighted that while the SOPA can in principle apply to progress payment claims served post-termination, this is subject always to any terms of the contract which provide to the contrary. While the SOPA provisions appear to suggest that a contractor's entitlement to serve a payment claim persists post-termination, as long as the payment claim is served before the end of the prescribed limitation period, this is subject to whether the contract entitles a contractor to serve progress payment claims after termination of the contractor's employment. Where the contractor's employment is terminated by the employer, and where there is no contractual entitlement to serve progress payment claims post-termination, the limitation period would not assist to enable the contractor to serve any progress payment claim.

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### **Application on the facts**

On an assessment of the terms of the relevant contracts, the Court of Appeal found that Dong Cheng did not have the right to serve PC 25 post-termination.

Dong Cheng argued that clause 30.3 of the REDAS Conditions conferred on it a right to serve a payment claim post-termination. However, the Court found that clause 30.3 only applied in the event of the termination of the employment of the Contractor under clause 30.2 of the REDAS Conditions. In this case, Dong Cheng's employment was terminated pursuant to clause 2.5 of the Supplementary Agreement. Therefore, clause 30.3 did not apply.

In any case, even if clause 30.3 were applicable, the Court found that it would not have entitled Dong Cheng to serve PC 25. On the facts, a precondition for payment under clause 30.3, being the ascertainment of all costs incurred by Orion as a result of Dong Cheng's termination, was not satisfied. Therefore, Dong Cheng was not entitled to any payment from Orion. More fundamentally, clause 30.3 was not concerned with *progress payments*; it was intended to provide for the final settlement of accounts between the contractor and employer in the event that the contractor is terminated for breach of contract. As such payments under clause 30.3 were not progress payments, they did not fall within the ambit of the SOPA. The Court held that its finding was reinforced by the fact that the SOPA is not intended to deal with damages claims, which clause 30.3 covered.

### **Concluding Words**

The Court of Appeal's decision highlights that the underlying contract is of central importance in determining a contractor's entitlement to serve a payment claim. Where such entitlement is not contractually provided for, the SOPA may not assist to create such rights.

The decision also demonstrates the importance of serving progress payments in a timely manner. The Court here remarked on the futility of applying for adjudication of a payment claim more than two years following the termination of the contract. In view of the fact that adjudication determinations only have temporary finality and may be reversed in subsequent arbitration or litigation that finally decides parties' rights and obligations, the Court encouraged parties to conduct a cost-benefit analysis prior to pursuing the adjudication route rather than incurring a further layer of costs with no apparent benefit.

For further queries, please feel free to approach our team below.

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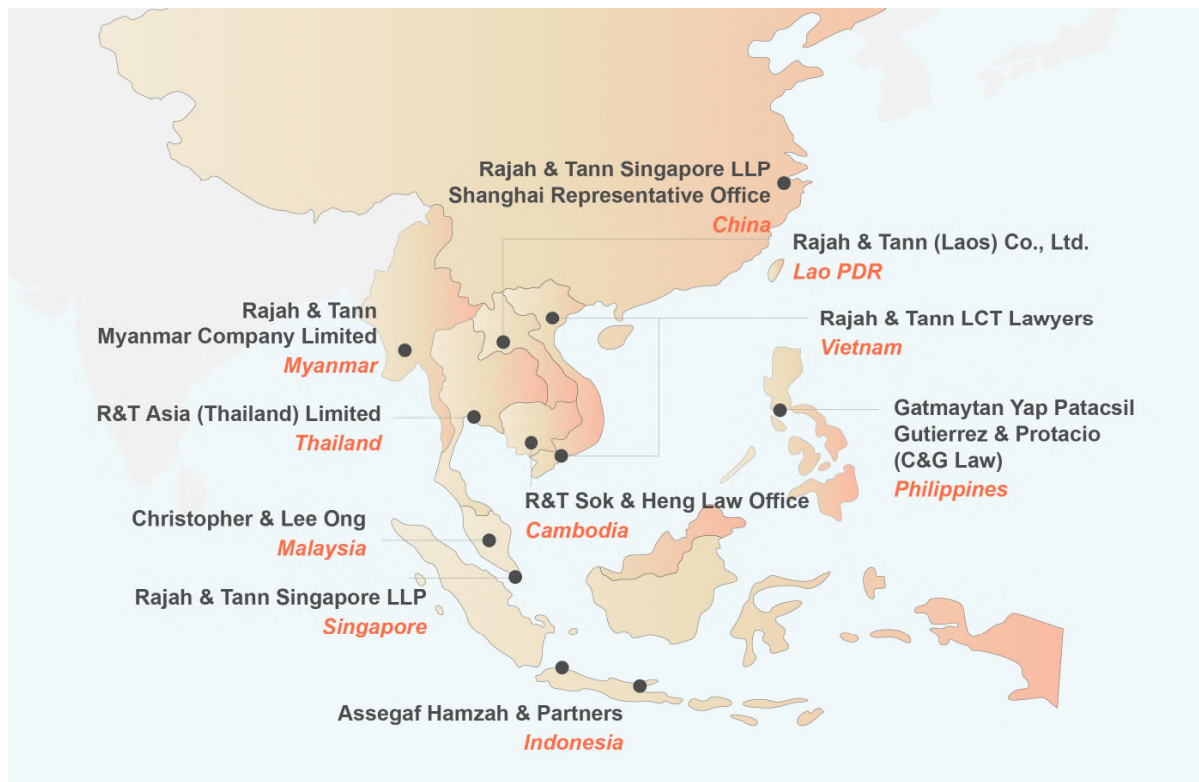
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